U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: WAC 03 107 52493 Office: CALIFORNIA SERVICE CENTER Date: OCT 13 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 12, 2001. The proffered wage as stated on the Form ETA 750 is $2,500 per month, which equals $30,000 per year.

On the petition, the petitioner stated that it was established on October 18, 1997 and that it employs nine workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. In support of the petition, counsel submitted copies of the 2000 and 2001 Form 1040 joint U.S. Individual Income Tax Returns of the petitioner's owner and owner's spouse, including the corresponding Schedule C, Profit or Loss from Business (Sole Proprietorship) showing the tax consequences of the petitioner's operations during those years. Because the priority date is April 12, 2001, information from the 2000 return is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and will not be further addressed.

The 2001 Schedule C, in addition to demonstrating that the petitioner was held as a sole proprietorship, shows that it declared a loss of $1,697 during that year. The tax return shows that the petitioner's owner and owner's spouse declared adjusted gross income of $16,732 during that year, including the petitioner's loss.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on May 12, 2003, requested additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested, *inter alia*, copies of the petitioner's California Form DE-6 Quarterly Wage Reports for the previous four quarters.

In response, counsel submitted the petitioner's compiled balance sheet as of June 30, 2003 and its compiled profit and loss statements for the preceding six months. Counsel also submitted the requested 2002 Form 1040 tax return of the petitioner's owner and owner's spouse and the requested California Form DE-6 quarterly reports for the second, third, and fourth quarters of 2002 and the first quarter of 2003.

The 2002 Schedule C shows that during that year the petitioner earned a profit of $18,203 for its owner. The 2002 Form 1040 shows that the petitioner's owner and owner's spouse declared adjusted gross income of $20,274 during that year, including the petitioner's profit. The Form DE-6 returns show that during the quarters they cover the petitioner employed two to three workers, but did not employ the beneficiary.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 26, 2003, denied the petition.

On appeal, counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that the petitioner may show the ability to pay the proffered wage even though its net income during a given year is less than the proffered wage. Counsel emphasizes that the petitioner is a viable business with assets, working capital and cash flow. Counsel argues that the petitioner's financial statements show the petitioner's ability to pay the proffered wage, notwithstanding that its annual net profits have been less than the proffered wage.

Counsel notes that the petitioner has made a profit during each of the salient years and "is not a candidate for bankruptcy." Counsel states that "[CIS] had made a determination that the Petitioner is not viable based upon the fact that the Petitioner's adjusted gross income does not exceed the proffered wage of the Beneficiary." Counsel also stated that the petitioner has a reasonable expectation of increasing profits.

Counsel is incorrect that CIS has determined that the petitioner is not viable. No such determination was made and that determination is not at issue. The issue in this case is whether the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

Counsel's reliance on the petitioner's gross revenues is inapposite. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS, then the Immigration and Naturalization Service, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the

depreciation expense charged for the year. *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

Counsel's reliance on unaudited financial records is also misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies of financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As that report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence, are insufficient to demonstrate the ability to pay the proffered wage, and will not be further addressed.

Counsel's citation of *Matter of Sonegawa, supra,* is unconvincing. *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. *Sonegawa* found that a demonstrable reasonable expectation of increasing profits, rather than an alleged reasonable expectation of increasing profits, may demonstrate the ability to pay the proffered wage.

The petitioning entity in *Sonegawa* had been in business for over 11 years. During the year in which the petition was filed in that case the petitioner changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which the petitioner was unable to do regular business.

In *Sonegawa,* the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière.

Counsels is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the record contains no evidence that the petitioner has ever posted a large profit. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative. No unusual circumstances have been shown to exist in this case to parallel those in Sonegawa, nor has it been established that either of the salient years were uncharacteristically unprofitable years for the petitioner.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the

petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is $30,000 per year. The priority date is April 12, 2001.

During 2001, the petitioner declared a loss. The petitioner has not demonstrated the ability to pay any portion of the proffered wage during that year out of its profits. The adjusted gross income of the petitioner's owner and owner's spouse during that year, including the petitioner's loss, was $16,732. That amount is insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during 2001. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

During 2002, the petitioner earned a profit of $18,203. That amount is insufficient to pay the proffered wage. The petitioner's owner and owner's spouse declared adjusted gross income of $20,274 during that year, including the petitioner's profit. That amount is also insufficient to pay the proffered wage. The petitioner has not demonstrated that any other funds were available with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.